TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~237.~~ 43

FRANCIS O. FRENCH, PLAINTIFF IN ERROR,

vs.

ROBERT W. FYAN, JAMES L. RUSH, AND P. L. BURFORD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED SEPTEMBER 8, 1874.

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a UNITED STATES OF AMERICA, *ss :*

[SEAL.] The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Missouri, greeting :

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the March term, 1874, thereof, between Francis O. French, plaintiff, and Robert W. Fyan, James L. Rush, and P. L. Burford, a manifest error hath happened, to the great damage of the said Francis O. French, as by his complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the second Monday of October next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this second day of June, in the year of our Lord one thousand eight hundred and seventy-four.

Issued at office in the city of St. Louis, with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

AUSTIN DRAKE,
Clerk C. C. U. S. Eastern Dist. Mo.
By H. C. GEISBERG,
Deputy.

Allowed by—

SAMUEL TREAT, *Judge.*

b UNITED STATES OF AMERICA,
Eastern District of Missouri, sct :

In obedience to the within writ of error I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Witness my hand at office in the city of St. Louis, in said district, this second day of July, A. D. 1874.

AUSTIN DRAKE, *Clerk.*
By H. C. GEISBERG, *Deputy.*

(Indorsed :) United States circuit court, eastern district of Missouri. Francis O. French vs. Robt. W. Fyan et al. Writ of error to the circuit court of the United States for the eastern district of Missouri. Returned and filed , 187 . , clerk.

c The United States of America to Robert W. Fyan, James L. Rush, and P. L. Burford, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the

second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Missouri, wherein Francis O. French is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel Treat, judge of the circuit court of the United States for the eastern district of Missouri, this third day of June, in the year of our Lord one thousand eight hundred and seventy-four.

SAMUEL TREAT,
Judge United States Circuit Court, Eastern District of Missouri.

Service on us acknowledged.
July 27, 1874.

SHARP & BROADHEAD,
For Defts.

(Indorsed:) United States circuit court, eastern district of Missouri. Francis O. French vs. Robt. W. Fyan et al. Citation. Filed , 187 . , clerk.

1 UNITED STATES OF AMERICA,
Eastern District of Missouri, set:

Pleas before the honorable the circuit court of the United States in and for the eastern district of Missouri, at the March term thereof, A. D. 1874.

FRANCIS O. FRENCH, PLAINTIFF,
vs.
ROBERT W. FYAN ET AL., DEFENDANTS. } Petition.

Be it remembered that heretofore, to wit, on the 27th day of February, A. D. 1872, there was filed in the office of the clerk of the circuit court of the United States for the district of Missouri a petition in words and figures following, to wit:

Petition.

In the circuit court of the United States for the district of Missouri, in the eighth circuit.

FRANCIS O. FRENCH
vs.
ROBERT W. FYAN, JAMES L. RUSH, & P. L. Burford.

Francis O. French, the plaintiff in this case, who is a citizen of the State of New York, states that on the 25th day of February, A. D. 1872, he was the owner of and entitled to the possession of the following-described premises situated in the county of Webster, in the State of Missouri, to wit, the southwest quarter of section numbered eight, in township numbered thirty-one north, of range No. (17) seventeen west of the 5th principal meridian; and being so entitled to the possession

thereof, the said Robert W. Fyan, James L. Rush, and P. L. Burford, the defendants herein, who are citizens of the State of Missouri,
2 afterwards, to wit, on the day aforesaid, entered into such premises, and unlawfully withhold from the plaintiff the possession thereof to his damage in the sum of two thousand dollars. Said plff. further avers that the said land is of the value of more than two thousand dollars; that the monthly value of the rents and profits of said premises is fifty dollars. Wherefore said plaintiff asks judgment for the recovery of the premises and two thousand dollars damages for the unlawful withholding of the same from the plaintiff, and fifty dollars per month for the monthly rents and profits from the rendition of judgment until the possession of the premises is delivered to the plaintiff and for other proper relief.

D. T. JEWETT,
Attorney for Plff.

And thereupon a summons issued in words & figures following, to wit:

Summons.

MISSOURI DISTRICTS, *sct:*

The President of the United States of America to the marshal of the western district of Missouri, greeting:

You are hereby commanded to summon Robert W. Fyan, James L. Rush, and P. L. Burford, citizens of the State of Missouri, that they be and appear before the honorable circuit court of the United States for the district of Missouri, on the first day of the next term thereof, to be holden at the city of St. Louis, in and for said districts, on the first Monday of April next, then and there to answer the complaint of Francis O. French, a citizen of the State of New York, as set forth in the petition filed in said court on the twenty-seventh day of February, A. D. eighteen hundred and seventy-two. Hereof fail not, and have you then and there this writ.

Witness the honorable Salmon P. Chase, Chief-Justice of the
3 Supreme Court of the United States, the twenty-seventh day of February, A. D. eighteen hundred and seventy-two. Issued at office, in the city of St. Louis, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.] AUSTIN DRAKE,
Clerk of said Court.

Upon which summons the marshal for the western district of Missour made return in words and figures following, to wit:

Marshal's return.

I hereby certify that I executed the within writ of summons by deli2, ering a copy of same & a copy of the petition filed in the within-entitl dv- caused, or annexed to the within-named James L. Rush and P. L. B ed ford, in the county of Webster, western district of Missouri, on the eur- day of April, 1872. e1st

And I further served copy of the within summons, petition, etc., the within-named party, R. W. Fyan, by leavin' copy at his usual p on of abode, with member of the family over the age of fifteen years. lace

Done in the county of Webster, western district of *of* Missouri, on the 1st day of April, 1872.

GEO. SMITH,
U. S. Marshal for Western District of Missouri,
By C. C. AVERY, *Deputy.*

And at the April term, A. D. 1872 of said circuit court, the following further proceedings were had in this cause on Tuesday, the 19th day of April A. D. 1872, to wit:

FRANCIS O. FRENCH, PLAINTIFF,
vs.
R. W. FYAN ET AL., DEFENDANTS. } Petition.

This day comes the plaintiff, by attorney, and, on motion of said attorney, it is ordered that an alias summons be issued herein, re-
4 turnable to the next term of this court. The alias summons issued as aforesaid is in the words & figures following, to wit:

Alias summons.

EASTERN DISTRICT OF MISSOURI, *set:*

The President of the United States of America to the marshal of the western district of Missouri, greeting:

You are hereby commanded to summon Robert W. Fyan, James L. Rush, and P. L. Burford, citizens of the State of Missouri, that they be and appear before the honorable circuit court of the United States for the eastern district of Missouri, on the first day of the next term thereof, to be holden at the city of St. Louis, in and for said district, on the third Monday of September next, then and there to answer the complaint of Francis O. French, a citizen of the State of New York, as set forth in the petition filed in the circuit court of the United States for the districts of Missouri, on the twenty-seventh day of February, A. D. eighteen hundred & seventy-two. Hereof fail not, and have you then and there this writ.

Witness the honorable Salmon P. Chase, Chief-Justice of the Supreme Court of the United States, the nineteenth day of July, A. D. eighteen hundred & seventy-two.

Issued at office, in the city of St. Louis, under the seal of said circuit court first mentioned, the day and year last aforesaid.

[SEAL.] AUSTIN DRAKE,
Clerk of said Court.

Upon which summons the marshal for the western district of Missouri made return in words and figures, following, to wit:

Marshal's return on alias summons.

I hereby certify that I executed the within writ by leaving a copy of the within summons and petition at the last usual place of abode of the within-named Robt. W. Fyan, with a white person over 15 years of age, who was a member of his family.

5 All done this 28 day of August, A. D. 1872, in the county of Laclede, town of Lebanon, western district of Missouri.

GEORGE SMITH,
United States Marshal, Western District Missouri.
By H. METCALF, *Deputy.*

I hereby certify that I executed the within-writ by leaving a copy of the within summons with a white person over 15 years of age, a member of the family at the last usual place of abode of the within-named P. L. Burford, and delivered a copy of the within summons to James L. Rush; all done this 8th day of August, in the county of Webster, western district of Missouri.

GEORGE SMITH,
United States Marshal, Western District Missouri.
By H. METCALF, *Deputy.*

And afterwards, at the March term, A. D. 1873, of the circuit court of the United States for the eastern district of Missouri, begun and holden at the city of St. Louis, in and for said district, on the 3d Monday, the 17th day of March, A. D. 1873, the following further proceedings were had in this cause, on Wednesday, the 19th day of March, A. D. 1873, to wit:

FRANCIS O. FRENCH, PLAINTIFF,
vs.
R. W. FYAN ET AL., DEFENDANTS. } Petition.

This day come the defendants, by their attorneys, Messrs. Sharp and Broadhead, and file their answer to the petition of said plaintiff herein against them, and said attorneys also file an agreement signed by counsel, consenting that a jury be waived herein.

The answer filed as aforesaid is in the words and figures following, to wit:

6 *Answer.*

In the circuit court of U. States for eastern district of Mo.

FRANCIS O. FRENCH
vs.
ROBERT W. FYAN, JAMES L. RUSH, AND P. L. Burford.

Defendants, for answer to the petition of plaintiff say, that it is not true that the plaintiff was on the 25th day of February, 1872, or at any other time, the owner of or entitled to the possession of the land described in the foregoing petition, or of any part thereof, and they deny that they entered into said premises as alleged and unlawfully withhold the possession thereof from plaintiff, or that the monthly value of the rents & profits is fifty dollars.

SHARP & BROADHEAD,
Attys. for Defts.

The agreement, waiving a jury herein, filed as aforesaid, is in the words and figures following, to wit:

Jury waiver.

United States circuit court eastern district of Mo. No. 31. O. S. March T., 1873.

FRENCH
vs.
FYAN & ALS.

We agree to waive a jury in the above-entitled cause.

SHARP & BROADHEAD,
For Def
D. T. JEWETT, *Atty. for Plf*

And afterwards, at the September term, A. D. 1873, of said last-mentioned circuit court, the following further proceedings were had in this cause, on Thursday, the 2d day of October, A. D. 1873, to wit:

FRANCIS O. FRENCH, PLAINTIFF,
vs.
R. W. FYAN ET AL., DEFENDANTS. } Petition.

7 *Finding and judgment.*

This day come the parties, by their respective attorneys, the plaintiff by D. T. Jewett, esquire, and the defendants by James O. Brodhead, esquire, and this case being regularly called for trial, and both parties being ready, and an agreement having been heretofore filed waiving a jury in this case, said case was thereupon tried by the court, sitting as a jury, and was argued by counsel and submitted upon the pleadings and proofs; and, being fully advised in the premises, the court finds the issues joined herein for the defendants.

It is therefore now considered by the court that said plaintiff, Francis O. French, take nothing by his writ herein, and that said defendants, Robert W. Fyan, James L. Rush, and P. L. Burford go hence without day, and recover against said plaintiff the costs herein expended, and that execution be issued therefor.

And thereupon said plaintiff files a motion to set aside the finding and judgment herein, and grant a new trial, which motion was argued by counsel and submitted and taken under advisement.

The motion filed as aforesaid, is in the words and figures following, to wit:

Motion for new trial.

In circuit court of the U. States for eastern dis. of Missouri. Sept. T., 1873.

F. O. FRENCH, PLFF.,
vs.
R. W. FYAN ET AL., DEFTS.

And now comes the plff. & moves the court to set aside the verdict or finding & judgment & to grant the plff. a new trial, for the following reasons:

1st. Because the court excluded legal and proper evidence offered by the plff., to wit, evidence to prove that the land in controversy is not now and never has been swamp-land within the terms and mean-
3 ing of the act of Congress granting swamp-land to the States.

2d. Because the court erred in the rulings upon the law appli-able to the facts in the case, in this, that the court wrongly ruled & ecided that the patent to the State of Missouri, dated 1857, offer by defts. for swamp-lands, including the land in controversy, th us a better title and took precedence of the certificate issued by the wi nd-Department, at Washington, to the Pacific Railroad in 1854, under wh act of Congress of 1854.

d. Because the rulings and decisions of the court upon the facts in
5 case were contrary to law & against the law.

h. Because the judgment & decision of the court was given in f of the defendants when they should have been for the plffs.

D. T. JEWETT,
Atty. for Plffs.

And afterwards, at the March term, A. D. 1874, of said circuit court the following further proceedings were had in this cause, on Saturday, the 4th day of April, A. D. 1874, to wit:

FRANCIS O. FRENCH, PLAINTIFF,
vs.
R. W. FYAN ET AL., DEFENDANTS. } Petition.

The court having considered the motion hereinbefore filed to grant a new trial, and being fully advised in the premises, it is ordered that said motion be overruled.

And afterwards, at said March term, A. D. 1874, of said circuit
9 court, the following further proceedings were had in this cause, on Saturday, the 25th day of April, A. D. 1874, to wit:

FRANCIS O. FRENCH, PLAINTIFF,
vs.
R. W. FYAN ET AL., DEFENDANTS. } Ejectment.

On motion of plaintiff's atttorney, leave is granted said plaintiff to file his bill of exceptions herein on or before the first day of June next.

And afterwards, in vacation of said circuit court, the following further proceedings were had in this cause, on Tuesday, the 28th day of April, A. D. 1874, to wit:

FRANCIS O. FRENCH, PLAINTIFF,
vs.
R. W. FYAN ET AL., DEFENDANTS. } Ejectment.

This day comes the defendant, by his attorney, D. T. Jewett, esquire, and files his bill of exceptions, which is signed by the honorable John F. Dillon, circuit judge, who presided at the trial of this case.

The bill of exceptions filed as aforesaid is in the words and figures following, to wit:

Bill of exceptions.

In the circuit court of the United States for the eastern dist. of Missouri.

FRANCIS O. FRENCH, PLFF.,
vs.
ROBERT W. FYAN & S. L. BURFORD, DEFTS.

Be it remembered that, on the trial of this cause,

10 1st. The plff. offered in evidence the act of Congress of June 10th, 1872, granting land to State of Mo. for railroad purposes.

2d. Act of general assembly of Missouri chartering Pacific Railroad approved March 12th, 1849, and also amendatory act of March 1st, 1851.

3d. Act of general assembly of Missouri, approved Dec. 25th, 1852, granting the land granted to Missouri by act of Congress before refer'ed to, to the Pacific Railroad for construction of southwest branch.

4. Resolution of board of directors of the Pacific Railroad, date , 1853, accepting the grant of land as made by the State, De 25th, 1852.

Which resolution was as follows:

OFFICE OF SECRETARY OF STATE,
CITY OF JEFFERSON, MISSOURI.

I, Eugene F. Weigel, secretary of state of the State of Missouri, do hereby certify that the annexed pages contain a true, complete, and full copy of the acceptance of the Pacific Railroad Company of an act entitled "An act to accept a grant of land made to the State of Missouri by the Congress of the United States, to aid in the construction of certain railroads in this State, & to apply a portion thereof to the Pacific Railroad," approved December 25th, 1852. Filed Jan'y 24, 1853. As appears by comparing the same with the original of said acceptance, now on file as the law directs in this office.

In testimony whereof I have hereunto set my hand and affixed my official seal. Done at office this 3d day of March, A. D. eighteen hundred and seventy-three.

[SEAL.] EUGENE F. WEIGEL,
Secretary of State.

11 By CHAS. SCHACKE,
Chief Clerk.

Resolution board of directors Pacific R. R. accepting land-grant.

OFFICE PACIFIC RAILROAD CO.,
St. Louis, 12th Jan'y, 1853.

At a meeting of the board of directors of the Pacific Railroad Company, held this day, the following resolution was unanimously adopted:

Resolved by the board of directors of the Pacific Railroad Company, That said company hereby approve and formerly accept the act of the legislature of the State of Missouri, passed at the adjourned called session of the year eighteen hundred and fifty two, and the grants of lands, State credit, and all other grants and privileges therein contained, according to the spirit, meaning, and intent of said act, entitled "An act to accept a grant of land made to the State of Missouri by the Congress of the United States, to aid in the construction of certain railroads in this State, and to apply a portion thereof to the Pacific Railroad," approved December 25th, 1852.

And that the president of said company cause a copy of this resolution, authenticated as required in said act, to be filed in the office of the secretary of state of the State of Missouri.

A true copy from the minutes of the board.

Attest:

[SEAL.] SAML. COPP, JR.,
Secr. P. R. Co.

To his excellency STERLING PRICE,
Governor of the State of Missouri.

The Pacific Railroad Company hereby certify and declare that they have accepted and do hereby accept the act entitled "An act to accept a grant of land made to the State of Missouri by the Congress of
12 the United States, to aid in the construction of certain railroads in this State, and to apply a portion thereof to the Pacific Railroad," pproved December 25th, 1852, and this certificate is presented for fil-ng in the office of the secretary of state, in compliance with the require-ents of said act, and particularly of the fifteenth section thereof.

In witness whereof, and in pursuance of a resolution of the board of rectors adopted on the twelfth day of January, eighteen hundred &

fifty-three, (a copy whereof is hereto annexed,) the said Pacific Railroad Company have caused their corporate seal to be hereto affixed and the name of their president and secretary to be signed to this certificate at St. Louis, this 21st day of January, one thousand eight hundred and fifty-three.

[SEAL.] THO. ALLEN,
President Pacific R. R.

Attest:
JAMES COPP, JR.,
Sec'y P. R. R. Co.

5. Exemplified copy of location of said road, as filed in the General Land-Office, at Washington, 1853.

It is agreed that the land in dispute is within less than six miles of the said southwest branch, as located on said plat filed in the Land-Office, & that said plat need not be copied in the case, as the point in controversy does not turn on that location or plat.

6th. A list of lands certified to the Pacific Railroad by the Commissioner of the General Land-Office, dated March 13th, 1854.

To which list of lands are annexed the certificates of the Com'r of the Land-Office & Sec'y of Interior, as follows:

13 *Certificates Commissioner Gen'l Land-Office.*

GENERAL LAND-OFFICE,
Washington, March 11, 1854.

I hereby certify that the foregoing, from pages one to one hundred and eleven, inclusive, are schedules of lands situated in the districts of land subject to sale at St. Louis, Jackson, Clinton, and Springfield, in the State of Mo., remaining unsold and undisposed of in the alternate sections designated by even numbers for six sections in width on each side of the railroad from St. Louis to the western boundary of the State of Mo., known as the first division of the Pacific Railroad and the southwestern branch of the Pacific Railroad of said State, the survey and location of which said railroad has been filed in this Office in pursuance of an act granting the right of way to the State of Mo., and a portion of the public lands, to aid in the construction of certain railroads in said State; approved June 10, 1852.

And I further certify that the said sections and parts of sections are granted to the said State of Mo. pursuant to the authority in said act, and I respectfully recommend that the said lands be approved to the said State of Mo., subject, however, to any valid interfering rights.

(Signed) JOHN WILSON, *Com.*

DEPARTMENT OF THE INTERIOR,
Washington, March 13, 1854.

Approved, subject to any valid interfering rights.

(Signed) R. MCCLELLAND, *Secretary.*

GENERAL LAND-OFFICE, *March* 14, 1854.

14 I, John Wilson, Commissioner of the General Land Office, do certify that the foregoing is a true and literal exemplification of the original approved list, on file in this Office, of lands granted to the State of Mo. by act of Congress approved the 10th of June, 1852, for the construction of a railroad from the city of St. Louis to a point on the

western boundary of said State, the route of said road having been designated by the State authorities under said act.

In testimony whereof I have hereunto subscribed my name and caused the seal of this Office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] (Signed) JOHN WILSON,
Com'r. Gen'l Land-Office.

It is agreed that in the list of lands so certified March 13th & 14th, 1854, is to be found the land sued for in this suit, & that the list, which is very long, need not be copied.

7th. Act of the general assembly of Mo., approved March 17th, 1868, selling the southwest branch of Pacific Railroad to a company organized as South Pacific Railroad Company.

8th. Acceptance of the South Pacific Railroad Company of the provisions of the act of March 17th, 1868, as follows:

OFFICE OF SECRETARY OF STATE,
City of Jefferson, Missouri.

I, Eugene F. Weigel, secretary of state of the State of
15 Missouri, do hereby testify that the annexed pages contain a true, complete, and full copy of the acceptance of the provisions of an act entitled "An act to dispose of the Southwest Pacific Railroad and other property belonging thereto, and to secure an early completion of said road."

Approved March 17th, 1868, by the directors of the South Pacific Railroad Company; filed June 15th, 1868, as appears by comparing the same with the original roll of said acceptance, now on file as the law directs in this office.

In testimony whereof I have hereunto set my hand and affixed my official seal. Done at office this 20th day of March, A. D. eighteen hundred & seventy-three.

[SEAL.] EUGENE F. WEIGEL,
Secretary of State.

Resolutions, board of D. South Pacif. R. R. Co., accepting provisions of acts of Mar. 17, '68

Whereas at a meeting of the directors of the South Pacific Railroad Company, held in the city of New York on the ninth day of June, A. D. eighteen hundred & sixty-eight, the following votes were passed:

Voted that this company hereby accepts the grant of the legislature of Missouri mentioned and referred to in the act of said legislature entitled "An act to dispose of the Southwest Pacific Railroad and other property belonging thereto, & to secure the early completion of said road," approved by the governor of the State of Missouri on March the seventeenth, A. D. eighteen hundred and sixty-eight, together with the conditions contained in said act.

Voted that the president and secretary of this company are authorized and instructed to execute an instrument in behalf of and under the corporate seal of the company, accepting the grant mentioned
16 & referred to in said act:

Now, in pursuance of the above-recited votes, the South Pacific Railroad Company doth hereby signify its acceptance of the grant mentioned & referred to in the act of the legislature of the State of Missouri entitled "An act to dispose of the Southwest Pacific Rail-

road & other property belonging thereto, and to secure the early completion of said road," which act was approved by the governor of the State of Missouri on the 17th day of March, A. D. eighteen hundred and sixty-eight, together with the conditions in said act contained.

In witness whereof the South Pacific Railroad Company has caused its corporate seal to be hereunto affixed & the same to be signed by Francis B. Hayes, its president, & William Halsey, its secretary, thereunto duly authorized, this ninth day of June, anno Domini eighteen hundred & sixty-eight.

[SEAL.] SOUTH PACIFIC RAILROAD COMPANY,
By FRANCIS B. HAYS, *President.*
WILLIAM L. HALSEY, *Secretary.*

9th. It was admitted that the road was turned over by the State authorities to the South Pacific Railroad Company according to the provisions of the act of March 17th, 1868.

10th. Act of the general assembly of Missouri of March 24th, 1870, authorizing sale & purchase of road.

17 11th. Deed of South Pacific Railroad Company of the road & all its lands to the Atlantic and Pacific Railroad.

It is agreed that this deed is, for the purposes of this case, not disputed and need not be copied.

12th. Deed of Atlantic & Pacific Railroad to the plff., dated Feb. 21, 1872.

It is agreed that this deed need not be copied, but is admitted for the purposes of this question.

13th. Letter of the governor of Missouri to the Secretary of the Interior that the road was completed 20 miles, passing by the land in controversy, dated as follows:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND-OFFICE, *April* 4, 1873.

I, Willis Drummond, Commissioner of the General Land-Office, do hereby certify that the annexed copy is a true and literal exemplification of the original on file in this Office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this Office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] WILLIS DRUMMOND,
Commissioner General Land-Office.

Letter of Gov. of Mo. to Sec'y of Interior.

THE STATE OF MISSOURI:

EXECUTIVE OFFICE, CITY OF JEFFERSON,
December 28th, 1870.

I, Joseph W. McClurg, governor of the State of Missouri, do, in pursuance of the provisions of the fifth section of the act of Congress, entitled "An act granting the right of way to the State of Missouri,

18 and a portion of the public lands, to aid in the construction of certain railroads in said State," approved June 10th, 1852, and an act supplemental to said act, approved June 5th, 1862, hereby certify to the Secretary of the Interior of the United States that the South Pacific Railroad Company, a company duly incorporated by the laws of the State of Missouri, and which company has acquired by act of the

legislature of the State of Missouri the lands granted by said act of Congress for the purpose of aiding in making a railroad from the city of St. Louis to a point on the western boundary of said State, designated by the authority of said State, has completed its railroad westward to the line dividing sections twenty-six (26) and twenty-seven, (27,) in township number twenty-five (25) of range number thirty-two (32) west of the fifth principal meridian.

In testimony whereof I have hereunto set my name and caused the great seal of the State to be hereunto affixed.

Done at the city of Jefferson this 28th day of December, A. D. eighteen hundred & seventy.

By the governor:

[SEAL.]

J. W. McCLURG.
FRANCIS RODMAN, *Secretary of State*,
By EUGENE T. FREIZEL, *Chief Clerk*.

Here the plff. rested.

The deft. then offered in evidence a patent of the United States to the State of Missouri, under the swamp-land grant of Sept. 28th, 1850, which patent was dated the 26th day of March, 1857, as follows:

19 *Patent of the U. S. to State of Mo. under swamp-land grant of Sept. 28th, 1850.*

No. 2.

The United States of America to all to whom these presents shall come, greeting:

Whereas by the act of Congress, approved September 28th, 1850, entitled "An act to enable the State of Arkansas and other States to reclaim the 'swamp-lands' within their limits," it is provided that all the "swamp and overflowed lands" made unfit thereby for cultivation within the State of Missouri, which remain unsold at the passage of said act, shall be granted to said State; and whereas in pursuance of instructions from the General Land-Office of the United States the several tracts or parcels of land hereinafter described have been selected as "swamp and overflowed lands" enuring to the said State under the act aforesaid, being situated in the district of lands subject to sale at Springfield, Missouri, to wit: * * * Township 31 north of range 17 west, * * * the whole of section eight, * * * according to the official plat of survey of said lands returned to the General Land-Office by the surveyor-general, and for which the governor of the said State of Missouri did, on the tenth day of February, one thousand eight hundred and fifty-seven, request a patent to be issued to the said State as required in the aforesaid act: Now, therefore, know ye that the United States of America, in consideration of the premises, and in conformity with the act of Congress aforesaid, have given and granted, and by these presents do give and grant, unto the said State of Missouri, in fee-simple, subject to the disposal of the legislature thereof, the tracts of land above described: to have and to hold the same, together with all the rights, privileges, immunities, and appurten-
20 ances thereto belonging, unto the said State of Missouri, in fee-simple, and to its assigns forever.

In testimony whereof I, James Buchanan, President of the United States of America, have caused these letters to be made patent and the seal of the General Land-Office to be hereunto affixed.

Given under my hand at the city of Washington the twenty-sixth day of March, in the year of our Lord one thousand eight hundred & fifty-seven, and of the Independence of the United States the eighty-first.

By the President:

[SEAL.] JAMES BUCHANAN,
By G. H. JONES, *Assist. Secretary.*

JOS. S. WILSON,
Acting Recorder of the General Land-Office ad interim.

I, Frd. Salomon, register of lands for the State of Missouri, do hereby certify the above to be a correct copy of swamp-land patent, No. 2, issued on the 26th day of March, 1857, as same appears on file in this office, and as far as said patent relates to section eight in township thirty-one, range seventeen west.

In testimony whereof I have hereunto set my hand and affixed my seal of office, at the city of Jefferson, this 2d day of September, 1873.

[SEAL.] FRD. SALOMON,
Register of Lands.

To the introduction of which the plff. objected—

1st. Because said patent was not issued to the State till after the certificate of March, 1854, before introduced, was issued to the Pa-
21 cific Railroad or the State for the railroad.

2d. Because the said certificate was a patent to the State for the railroad, & vested title, which could not be divested by patent of 1857 without proof that lands were such as were granted by the swamp-land grant.

But the court overruled the objections and admitted the patent; to which ruling the plff. then and there excepted.

Deft. also offered & put in evidence the certificate of sec. of state of Mo. to Webster County of swamp lands in that county, containing the land in suit.

It is agreed that said certificate is in due form & need not be copied.

It is admitted that the defts. have a regular chain of title under Webster County, if the patent of 1857 gave title under the swamp-land act.

The deft. here rested.

The plff. then offered to prove, in rebuttal, by witnesses who had known the character of the land in dispute since 1849 till the time of trial, that the land in dispute was not swamp and overflowed land made unfit thereby for cultivation, & that the greater part thereof is not and never had been since 1849 wet and unfit for cultivation.

But the court ruled that since the deft. had introduced a patent from the United States to the State for the said land under the act of
22 Sept. 28th, 1850, as swamp land, this concluded the question, & the court, therefore, rejected said parol testimony; to which ruling of the court the plff. then and there excepted.

The court then gave judgment for the deft.

The plff., in due time, filed a motion for a new trial, as follows:

(Copied on page 7 of this transcript.)

Which motion the court overruled; to which action of the court in overruling said motion the plff. then & there excepted.

It is agreed that none of the statutes of the United States or of the State of Missouri need be copied in the bill of exceptions, but may be used and read from the books as published.

The plff. therefore asks that all the above evidence offered & given,

or offered & refused, all the papers put in evidence, & all the rulings & other proceedings, & the motions be made a part of the record; which is accordingly done.

JOHN F. DILLON, [SEAL.]
Circuit Judge.

And afterwards, at said March term, A. D. 1874, of said circuit court the following further proceedings were had in this cause, on Wednesday, the 3d day of June, A. D. 1874, to wit:

FRANCIS O. FRENCH, PLAINTIFF,
vs.
R. W. FYAN ET AL., DEFENDANTS. } Ejectment.

23 This day comes the plaintiff, by his attorney, and presents a writ of error to reverse the judgment herein; also a citation directed to said defendants, and a bond duly executed as required by law; whereupon the said writ of error is allowed, the citation signed, and the bond approved and ordered to be filed and made a part of the record herein.

The bond filed as aforesaid is in the words & figures following:

Bond of appeal.

Know all men by these presents that we, Daniel R. Garrison, as principal, and T. B. Edgar as surety, both of St. Louis, Mo., are held and firmly bound unto Robert W. Fyan, James L. Rush, and P. L. Burford in the full and just sum of five hundred dollars, to be paid to the said Robert W. Fyan, James L. Rush, and P. L. Burford, their heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 3d day of June, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas lately, at the March term, A. D. 1874, of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court between Francis O. French, plaintiff, and Robert W. Fyan, James L. Rush, and P. L. Burford, judgment was rendered against the said plaintiff, and the said plaintiff having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendants citing and admon-

24 ishing them to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Francis O. French shall prosecute said writ to effect, and answer all damages & costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

DANIEL R. GARRISON. [SEAL.]
T. B. EDGAR. [SEAL.]

Approved by—

SAMUEL TREAT.

25 UNITED STATES OF AMERICA,
Circuit Court for the Eastern District of Missouri, ss :

I, Austin Drake, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto annexed to be a transcript of the record and proceedings in case of Francis O. French against Robert W. Fyan et al., petition, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court at office in the city of St. Louis, in said district, this second day of July, in the year of our Lord eighteen hundred and seventy four.

[SEAL.] AUSTIN DRAKE, *Clerk*,
By H. C. GEISBERG, *Deputy*.

(Indorsed:) United States circuit court, eastern district of Missouri. Francis O. French against R. W. Fyan et al. Duly certified transcript of the record and proceedings in the above-entitled cause.

(Indorsement on cover:) No. 237. Francis O. French, plaintiff in error, vs. Robert W. Fyan, James L. Rush, and P. L. Burford. E. Missouri C. C. U. S. Filed 8th September, 1874.

CHANCY R. BARNS, PRINTER, 215 PINE STREET.

IN THE

SUPREME COURT

OF THE UNITED STATES,

October Term, 1875.—No 237.

ERROR FROM THE UNITED STATES CIRCUIT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

F. O. FRENCH,

Plaintiff in Error and Plaintiff Below,

vs.

B. W. FYAN, *Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

D. T. JEWETT,
Attorney for Plaintiff in Error.

IN THE

SUPREME COURT

OF THE UNITED STATES,

October Term, 1875.—No. 237.

ERROR FROM THE UNITED STATES CIRCUIT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

F. O. FRENCH,

Plaintiff in Error and Plaintiff Below.

vs.

B. W. FYAN, *Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

This is an action of ejectment for one hundred and sixty acres of land in Webster County, Mo., to which the plaintiff claims title under the grant made to the State of Missouri in 1852, by Act of Congress, for the use and benefit of the Pacific Railroad; and the defendant claims title under the Swamp land Grant made by Congress to the State in 1850.

On the 28th of September, 1850, (U. S. Statutes, Vol. 9, page 519), Congress passed an Act which said:

"The whole of those swamp and overflowed lands made thereby unfit for cultivation, which shall remain unsold at the passage of this Act, shall be and the same are hereby granted to the several States in which such lands lie."

The second section says: "It shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this Act, *to make out* an accurate list and plats of the lands described as aforesaid, and transmit the same to the Governor of the State, and at the request of said Governor, cause a patent to be issued to the State therefor, and on that patent, the fee simple to said lands shall vest in said State, subject to the disposal of the Legislature thereof."

Section third says: "That in making out a list and plat of the land aforesaid, all legal sub-divisions, the greater part of which is wet and unfit for cultivation, shall be included in said list and plats, but when the greater part of a sub-division is not of that character, the whole of it shall be excluded therefrom."

On the 10th of June, 1852, (U. S. Stat., vol, 10, p. 8,) Congress granted to the State of Missouri for the purpose of aiding in the building of a railroad from St. Louis to the western borders of the State, the alternate even sections of all public lands for the distance of six miles on each side of said road; and the Act required that a plat of the location of said road should be filed in the Land Office at Washington, as soon as the same was located, and a certificate specifying the sections or legal sub-divisions of the land so appropriated should be issued by the Land Office to the R. R. Co., as soon as practicable after the said plat of the location of the road was filed.

A proviso in said Act said: "Any and all lands heretofore reserved to the United States by any Act of Congress, or in any other manner, by competent authority, for the purpose of aiding any object of internal improvement, or for any other purpose, be and the same are hereby reserved to the United States from the operation of this Act." This Act also required that its terms should be accepted by the State; that the lands should be used for the purpose of building the road,—that certain proofs should be made that twenty miles of road had been built, and that then the rail-

road company should be entitled to the said sections for twenty miles, etc.

On the 25th day of December, 1852, the Legislature of Missouri passed an Act accepting said grant and the terms thereof, and also granted the land to the Pacific Railroad Company, (which had been previously chartered and organized,) for the purpose of building its Southwest branch. That company, by a vote of its Directors, as the Act required, duly accepted that grant in 1853. The said railroad company located their Southwest branch road, and filed a plat of said location in the Land Office at Washington. on the 1853.

On the 11th of March, 1854, the Commissioner of the General Land Office at Washington issued his certificate under his seal of office, and approved by the Secretary of the Interior March 13, 1854, to the Railroad Company, wherein was specified in due form all the legal divisions and subdivisions of land to which said Company was entitled by virtue of said grant, and the location of their road; and among such subdivisions so specified was the quarter section sued for in this action. By various conveyances and proceedings, not disputed in this action, and not necessary to specify as the case does not turn upon them, that said quarter section became the property of the plaintiff in this case, *if* the railroad title is good.

On the 3d of August, 1854, (U. S. Statutes, Vol. 10, p. 346) the following act was passed by Congress: "That in all cases where lands *have been* or shall hereafter be granted by any law of Congress to any one of the several States and Territories; and where said law does not convey the fee simple title of such lands, or require a patent to be issued therefor, the lists of such lands *which have been or may hereafter* be certified by the Commissioner of the General Land Office, under the seal of the office, either as originals or copies of the originals or records, shall be regarded as conveying the *fee simple of all lands embraced in such lists*, that are of the character contemplated by such act of Con-

gress, and intended to be granted thereby; but where lands embraced in such lists are not of the character embraced by such acts of Congress, and are not intended to be granted thereby, said lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim or interest shall be conveyed thereby."

On the 3d of March, 1857, (U. S. Stat. Vol. 11, p. 257,) Congress passed the following Act: "All lands selected and reported to the General Land Office as swamp and overflowed land by the several States entitled to the provisions of the Act of September 28, 1850, prior to the 3d day of March, 1857, are confirmed to said States respectively, so far as the same remained vacant and unappropriated, and not interfered with by an actual settlement under any law of the United States."

On the 26th day of March, 1857, a patent was issued by the proper authorities to the State of Missouri for the swamp lands that had been selected as such, and in that patent is named the same quarter-section sued for in this suit—so that the same quarter-section has been patented to the Railroad under the grant for that purpose, and to the State as swamp land.

On the 3d day of March, 1851, the Legislature of Missouri passed an Act donating all the swamp lands to the several counties in which such lands might lie. Except a few counties in the Southeast part of the State, for which a board was created to devise some means of drainage.

This Act authorized the counties to borrow money to drain said lands, and it also authorized the County Courts to sell the lands on such terms as they thought best, the receipts to be paid into the County School fund. In pursuance of this law, a chain of conveyances, not disputed here, passed whatever title the State had under the Swamp Land Grant to the quarter section of land in dispute in this case to the defendant. And the only questions before this court are—which is the better title on the face of it, and was certain parol testimony offered by the plaintiff in rebuttal, properly or improperly excluded by the Circuit Court.

On the trial a jury was waived, and the plaintiff offered and put in evidence the Acts of Congress,—of the Legislature of Missouri,—the proceedings of the railroad company, —the plat of the location of the road,—the Land Commissioner's certificate, and the various conveyances necessary to put whatever title the State acquired to the land under the Act of Congress of June 10, 1852, in the plaintiff. The defendant then put in evidence the Swamp Land Act of September 28, 1850,—the patent to the State of the swamp lands, dated March 26, 1857,—the Acts of the Legislature, donating such lands to the counties,—the certificate of the Governor, to Webster county, of the lands located in that county,—and the necessary proceedings and conveyances to vest in the defendant, all the title of this tract that the State got by virtue of the said Swamp Land Act of September 28, 1850. The pleadings admitted the value of the land and the possession of the defendant.

In rebuttal, the plaintiff then offered to prove by witnesses acquainted with the land, and who had known it since 1849 until the time of trial,—that this land in suit was not swamp or overflowed land made unfit thereby for cultivation, and that the greater part thereof is not and never had been since 1849 wet and unfit for cultivation.

The court ruled, that since the defendant had introduced a patent from the United States to the State of Missouri for the said land under the Act of September 28, 1850, as swamp land,—this *concluded* the question, and therefore the court rejected the testimony,—to which ruling the plaintiff excepted.

The court rendered judgment for the defendant.

A motion for a new trial was duly filed, and was overruled.

A bill of exceptions was tendered and allowed, which preserves all the evidence and proceedings in the case—and the case comes here by writ of error.

The errors complained of are, first, that the Court improperly ruled that the defendant under a patent, dated March 26, 1857, had a better apparent title than the

plaintiff had under the certificate of the Land Commissioner, dated March 13, 1854, and which the Act of Congress of August 3, 1854, declares is equal to a patent and passes the fee simple.

It is not disputed but that this Court has decided that the Act of September 28, 1850, passed, *proprio vigore*, the absolute title to all lands that were of *the description specified in the Act*, but it certainly did not pass the fee to lands that are *high and dry*, as we claim this to be. It is also admitted that this Court has decided that the proviso in the railroad grant of June 10, 1852, excludes from the operation of that Act all lands that are swamp and overflowed, as described in the Act of September 28, 1850; but that is not very material, as it would seem to be plain that, if all such lands were disposed of by the Act of 1850, they could not again be affected by the Act of 1852, even without a proviso.

As all such lands had been granted in 1850, and also reserved from the operation of the railroad act of 1852, the Land Department, when granting its certificate to the railroad in March, 1854, must be considered as *then deciding* that the tracts certified to the railroad were *not* swamp lands. There is no *reservation* in that certificate; it purports to "grant" to the railroad, or rather to the State of Missouri for the railroad, *all* the land therein specified. The Act of September, 1850, is a grant that attaches to *no particular section or quarter section;* it is inoperative till it finds swamp and overflowed tracts; but the railroad grant *specifies* the subdivisions upon which it operates the moment the road is located. The railroad title to this land became *absolute* in August, 1854, *if it was dry land;* just as absolute and indefeasible as would be the title of a *private purchaser*, through the Land Department, of the adjoining odd section or quarter section, under a patent dated August, 1854.

Now as the swamp land grant does not designate any locality that is thereby granted, has the Secretary of the Interior power, under that Act to *take away* from any private

purchaser *any piece of land* patented to him in 1854, by putting *that piece of land* into a swamp land patent in 1857; and this upon the *face of the paper*, without proof that the land is swamp land. That Act only says, "that it shall be the duty of the Secretary of the Interior, as soon as it may be practicable, to make out an accurate list and plats of the land described as aforesaid and transmit the same to the Governor of the State, and at the request of the Governor, cause a patent to be issued to the State therefor," This selection of the Secretary may be conclusive as to the United States, possibly, but does it give his decision power to vacate instanter, a patent already granted to another? If so, no man's title would be safe against the swamp land grabbers. It is matter of history well known to the Land Department, how these swamp land lots were selected. As soon as the State donated the land to the counties in 1851, it immediately became the interest of the county and all the land grabbers in it, to make all the public lands in the county "swamp lands," and it was soon found that it was only necessary that there should be a little brook, or a small frog pond on it to make any quarter section or even a section, "swamp land." These representations of what was swamp land were made by the county officials to the land office at Washington, to have such and such lands put into the swamp land list. These frauds soon became known at the land office, and the authorities refused to patent.

Finally, influence enough was brought to bear to get through Congress the Act of March 3, 1857, which I have quoted, "confirming" the selections made up to that date, "so far as the same remained vacant and unappropriated, and not interferred with by an actual settlement under any law of the United States."

As soon as this Act was passed, and on the 26th of March, 1857, the patent was issued to this State, covering all the lands the county authorities had represented as swamp lands. We therefore say there is nothing in the law that authorizes the Secretary of the Interior, through cer-

tificates or affidavits sent to him from local parties *interested to deceive*, to take away by a patent in 1857, lands to which he had made a good title by patent in 1854.

In 1854, the Secretary of the Interior by his certificate said it *was not swamp land*, as all *that* had been granted to the State before, and was also reserved from the Act of 1852, and he had no right to certify swamp land under the railroad grant. *And if it was dry land*, as we say it was, the title under the railroad grant was *complete*. Now, does the insertion of that same quarter section in the swamp land patent in 1857, take our land from us, or compel us to prove it *dry land?* And this especially after the Act of Congress of March 3, 1857, which confirmed *all selections*, whether it was swamp land or not. The plaintiff's was the first complete title that *attached to this piece of land*. There was no *cloud upon the title* when the railroad took it, as they knew it was *dry land*. They had no reason to *suspect* that any county agent would get it *falsely reported* as swamp land. I therefore say that upon the *face of the papers*, the title of plaintiff is the better one, and that the *burthen of proof* is upon the defendant to show that the patent under which plaintiff's title is derived, was improperly made to cover swamp lands.

But the plaintiff, *in rebuttal*, offered to *prove* by witnesses acquainted with the land, (and by a topographical survey also,) and who had known the land since 1849 till the time of trial, that the land *was not swamp* and overflowed, and made unfit thereby for cultivation, and that the greater part thereof is not, and never has been since 1849, wet and unfit for cultivation. But the Court ruled that the patent of March 26, 1857, which was issued for swamp lands under the Act of 1850 and which named this quarter-section as one of the subdivisions—was *conclusive* on that point, and therefore rejected such testimony. This appears in the bill of exceptions, Record p. —— I had supposed when this suit was brought, that the opinion of the Supreme Court of Missouri, in the case of the Hannibal and St. Joseph Rail-

road Company vs. Smith, 41 Mo. p. 325, and the same case affirmed on appeal to this Court, in 9 Wallace, 95, fully covered this case, and settled the point that the *fact* of whether the land was or was not swamp land, was a question to be settled by the Courts, at least, when *both parties* claiming, had an apparent title from the United States.

In the case above referred to, it appears that there was no evidence that the land had ever been selected as swamp land, by the Secretary of the Interior. The defendant was simply a squatter on the land, without title, and the Railroad, as plaintiff, had made a good chain of title under the grant to the State for the benefit of the Railroad, under a statute that is the same as in this case at bar. This Court allowed the defendant to prove by parol evidence that the land was of the character described in the Act granting swamp lands to the States, and that therefore the land did not pass to the Railroad, although included within the Road's limits, and named in its certificates of lands granted to it.

The Court in that say: "Must the State lose its land, though clearly swamp and overflowed, because that officer (Secretary of the Interior) has neglected his duty. The right of the State did not depend on *his* action, but on the *Act of Congress*, and though the State might be embarrassed by the delay or failure of the Secretary to ascertain and make out lists, the *right* of the State to them would not be defeated by that delay."

"As that officer had no satisfactory evidence under his control to enable him to make out these lists, as is shown by the correspondence of the Land Department, he must rely on witnesses whose personal knowledge enabled them to report as to the character of the tracts claimed to be swamp and overflowed."

Now, if the *neglect* of the Secretary cannot deprive the State of lands that are *actually swamp*, would his *refusal*, upon the information he gets, to put a lot into his list and patent, *deprive* the State of that lot, *if it was* actually swamp land? How could it? when this Court says the *right* of the

State depends upon the act of Congress, and *not* upon the action of the Secretary.

My client's title to this land, *if it is not swamp land*, is as good as any other man's title in the State. Can the Secretary of the Interior—*acting upon information which we offer to prove was false*, and three years after my client has his title—take it away from him by putting this lot into a patent for swamp lands, and thus debar him from the privilege of proving in Court that the Secretary's *local informer* was guilty of misrepresentation or ignorance? Can the railroad or its grantees be defrauded of their lands in that way?

Again, has the Secretary, under this Swamp Land Act, power to convey to the State *any land he pleases*, under the color of having received information that it is swamp land, when in fact it is not. And is this finding so absolute and unalterable that its correctness *cannot be disputed* in a court of justice by a party who has *another chain* of title to the same land from the United States? If so it would seem that the Secretary and his local informers may take away any man's title or convey any Government land through this Swamp Land Act, to which the county informers may take a fancy *sufficiently strong* to magnify a small frog pond till it looks to them like a large swamp.

It is certainly not necessary to cite authorities to this Court to satisfy your Honors of the well settled doctrine that, where two parties claim the same piece of land, each having a regular chain of title from the Government, either party may dispute the other's title in the judicial tribunals, to determine which is the better title.

I know of no case where one patent has ever been held to be *conclusive* on the face of it against another patent for the same land, without any enquiry into the regularity of its issue and all the facts upon which its validity must be founded. But in this case, quoted in 9th Wallace, this Court has gone beyond the common rule, and allowed a squatter on a tract of land to dispute a patent from the United States, by

showing that the *kind* of land he is on, was not properly in the patent of the plaintiff ; or at least he was allowed to show an outstanding title in the State better than the plaintiff, though he did not claim under that title.

It would do great injustice to the railroads of Missouri, and the grantees who claim under their title, if every piece of land named in the swamp land patent, issued after the Act of 1857, is taken *absolutely* from them without admitting investigation in the courts, as to whether or not such lands were in fact swamp lands, and properly put into those patents. I may say, with propriety, that there are *very many* sections, and quarter sections, of land in Missouri, and probably in other States, the titles to which stand precisely as they do in this case, and it is important that the question should be settled according to the just and proper meaning and intent of the statutes under which these grants were made. I could not see why the case in the 9th Wallace did not settle the construction of the statute and the law of the case, but the Circuit Court did not see the matter in that light, and hence this case is here.

D. T. JEWETT,
Attorney for Plaintiff in Error.

Supreme Court of the United States.

No. 42.—October Term, 1876.

Francis O. French, Plaintiff in Error, *vs.* Robert W. Fyan & Others, Defendants.	In error to the Circuit Court of the United States for the Eastern District of Missouri.

Brief of Montgomery Blair, for Defts. in Error.

Statement.

This is an action of ejectment brought by plaintiff in error for a quarter section of land situate in Webster county, Missouri. Plaintiff claimed title under the grant to the state by the United States of 10th June, 1852, for railroad purposes.—(pp. 7, 8, 9, 10, 11, and 12.) The tract sued for is in the list of lands certified to the state on 13th and 14th March, 1854, by the Commissioner of the General Land Office.—(p. 9.) The defendant derived title under the grant by the United States to the state of the *swamp land*, of 28th September, 1850, and a patent under that act was issued to the state on 26th March, 1857.—(pp. 12, 13.) Plaintiff in error offered oral testimony tending to prove that the land was not swamp land at the date of the swamp-land act, but the court refused to admit the testimony, and plaintiff excepted. The court also held the title

under the patent to be a better title than that under the certificate, though of later date, to which ruling the plaintiff also excepted.

ARGUMENT.

(1). It has been repeatedly decided by this court that the swamp-land grant was a *present* grant.—(Railroad Company vs. Smith, 9 Wall., 95; Railroad Company vs. Fremont County, Ib., 89; and Buchanan vs. Clarkson, decided at last term.)

(2). It was also decided in those cases that parol proof was competent to show that the land claimed under the swamp-land act was swamp land, where the Secretary of the Interior had failed to do the duty imposed on him by law of ascertaining and certifying the fact to the state. But when, as in this case, he had acted, and had decided upon the character of the land, his decision is final at law, it being the decision of the officer to whom the law had committed the determination of the question.—(Wilcox vs. Jackson, 13 Peters, 511.) Nor could it be set aside in an equitable proceeding, except for fraud or imposition, alleged and proved.—(McPherson vs. Cowan, decided at last term.)

MONTGOMERY BLAIR,
For Defendants in Error.